

Pitfalls of a Precious Opportunity

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After forty years, Chile recently expressed the will to no longer being governed by the Constitution bequeathed by Pinochet. And it did so in a resounding manner through a plebiscite. The path that will lead to the election of the Constitutional Convention and then the drafting of the new Constitution seems to be exciting: we are observing how a genuine constituent moment is unfolding. However, the importance of the social question coupled with the new constitution carries the risk of over-constitutionalisation and the lack of leadership in the constitutional process could diminish its perception of legitimacy.

An extraordinary vote

Chile overwhelmingly voted in favour of writing a new constitution. Final results [show](#) that 78.27% of people voted to approve a process that will bring forth a new constitution. The indication is clear and cannot be misinterpreted. There has to be a clear symbolic break with the written Constitution of the dictatorship. However, there is more to that than the obviously important symbolic constitutionalisation of a new order. The distribution of the votes is also quite telling. In 341 of the country's 346 communes the option 'approve' (apruebo) [won](#). In the 20 communes with the highest support, the vote for approval exceeded 88%. The other option, rejection, succeeded only in five of the 346 communes. It is noteworthy that three of them are also the wealthiest communes in the country (i.e., those with higher income) while the other two are small and isolated communities (one, literally, in the Antarctic). With these results, the idea of division or [polarisation in Chile](#) comes into question and shows a different cleavage. This time the great divide is between the economic and political elite on one hand, and the people on the other. Ample sectors of the Chilean society felt that they hadn't received their share of the growth and economic prosperity that the country has experienced over the last decades.

The referendum also showed strong support for one of the options regarding the way in which the process of constitutional change must be done. The outcome concerning the question about the constitutional body that will draft the new Constitution has been equally impressive: 78,99% voted for an entirely newly elected body with perfect gender equality, while only 21,01% chose the option which included elected representatives and actual members of the parliament. One should not underestimate the choice of this option. It shows a high level of distrust and perceived unrepresentativity of the current elected politicians. If the latter had been seen as important representative staples of Chilean society, the difference between the two options would have been substantially lower. Although not all details of the functioning of the convention have been decided, a 155 seats convention open equally to both genders might offer the opportunity for the emergence of a new political subject or the rise of new political figures. Unfortunately, the representation of indigenous peoples, through specific quotas, is still a matter of debate.

Although the participation rates were less impressive than the approval figures – with 50.90% the turnout barely exceeded that of the last presidential election in 2017 (49.02%) – they must be put into context. First of all, the vote has taken place in the midst of the Covid-19 pandemic. The impact of the coronavirus on the nation has been huge ([Chile is 8th in deaths/1M pop, with over half-million cases](#)), [in many ways](#). Even though the figures are more encouraging today, holding the referendum was an uneasy task. The vote, originally planned for April, was postponed, public campaigning was severely limited to prevent the spread of the virus. Specific measures to incentivise safe participation were imposed for the election day: infected people were excluded from the process, the polling journey was especially long and a ‘special voting time’ was dedicated to the elderly. Furthermore, it was the highest participation rate since the vote was made voluntary in 2012. More importantly, political participation grew in almost all districts. These figures include [some significant increase](#) in the participation rates in the poorest districts and younger voters, two groups whose political participation had been decreasing during the last decades.

A constitution for social equality

This substantial rejection of the current Constitution is not only connected to its origin, [as noted](#) recently, but above all to its content. It is quite telling that the form of political institutions is not at the forefront of the constitutional debate. Given its origin, one could have expected that presidentialism would be at the centre of people’s concerns: the repudiation of the old constitutional order would entail the symbolic rejection of the presidentialist form of government. Yet, quite surprisingly for a country who experienced a bloody coup organised by the military, the form of government is not a matter of urgent debate.

As we have already explained in a [previous post](#), the Chilean Constitution has functioned as a limit to the redistribution of political and economic power. Through a series of ‘locks’, the Chilean Constitution has safeguarded political and economic stability at the cost of making the unequal distribution of the benefits of economic growth constitutionally invisible. For that reason, it became the main target of the social movement of October 2019. Chile’s awakening (in Spanish, *Chile despertó*) was triggered by the frustration of masses due to the [structural inequalities](#) and unfair distribution of welfare across society. The claims of the movement were all revolving around welfare. From abroad, Chile had been perceived as ‘the miracle’ of the Latin American region. At the same time, many in Chile were burdened by deep inequalities in education, a high cost of living, poor welfare coverage and poor pensions, long working hours, industrial predation of the environment, and a massive sense of abuse (corporate collusion and tax evasion). The protests that erupted last year brought the social question back on the table. Political parties, rather than being involved in the organisation of these protests, were actually taken by surprise. Bypassing directly the link with potentially supportive parties (what Bruce Ackerman calls the ‘movement-party nexus’), protesters demanded not only the re-embedding of markets into society, but crucially the constitutionalisation of the social question. We are observing a reversal of the classic Arendtian trope: while for the author of *On Revolution* constitutions should establish the institutions of political freedom without

getting involved into questions of social justice and poverty, the Chilean movement coupled almost from the beginning the demand for the redress of social injustice with the claim for a new constitution.

Content and leadership

Possibly, this is where the most significant challenge lies for the future constitutional convention. The new Constitution will be called upon to respond to the social disaster and to support the distribution of welfare and wealth. Expectations, then, are extremely high and disappointment and failure likely. With multiple demands, defining the 'non-negotiable' seems a defiant task. As we are only at the beginning of a long process, it is too early to anticipate all the challenges that the main social and political forces will have to face. Two issues that might affect the next steps of the constituent process can be mentioned. First, the amount of functions that will be attributed to the Constitution. As said, there will be intense pressure for the constitutionalisation of many issues, with all the known problems that the phenomenon of over-constitutionalisation brings with it: the problematic role of constitutional justice, the over-entrenchment of norms, and a strong tendency to originalism. All these phenomena would be incompatible with the spirit of the protests of October 2019, which showed the creativity of non-institutional politics. Over-constitutionalisation usually creates the opposite: not an opening of the space for political action, but a closure. Moreover, an excessive demand put on the constitutional text might also push the members of the convention to discuss too many topics, losing the focus on the most foundational issues in favour of constitutional details and regulation.

The second point of concern is the fact that the social movement, [spontaneous at its origin](#), has not yet produced a clear political subject (or an alliance of political subjects) that can be seen as the bearer of the constituent process. It increases the risk that the process will be captured by the elites and traditional political parties, losing representativeness and legitimacy in the eyes of the social base that initiated it. In other terms, no political bloc has become hegemonic yet and, accordingly, no political subject seems capable, at least at this stage, to function as the catalyst of constitution-making. Without a subject capable of aggregating and organising a convergence among forces, it will be difficult to find consistent majorities for the approval of the new constitutional text. This is even more problematic in light of the requirement that the new Constitution must be approved by 2/3rd of the whole convention. The requirement for a super-majority quorum, which was agreed in the foundational agreement that made the constituent process possible, establishes an additional difficulty for the constitution-making process.

We have been keen on stressing two features of the Chilean constituent process, the cleavage between elite and people and the lack of trust in the political system. At first sight, this looks like a classic populist case: hatred for the elite and loathe of political parties. Usually, the resentment feeding that hate paves the way for an authoritarian constitutional outcome. Yet, the Chilean case seems to proceed on a different trajectory. The referendum's outcome reveals a certain hope in the constitution-making process as a new space where to find answers to the social

question. The end-result of the constituent process is totally uncertain and at this stage anything is still possible. Even failure should not be discarded as a concrete possibility. Be that as it may, the social movement and the plebiscite have opened up a constitutional space previously unavailable. It is now up to political subjects and movements to make the most out of this precious and rare opportunity.

